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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 896.

CHARLES MORENO,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

I. JURISDICTION.

On November 6, 1955, the petitioner, Charles Moreno, commenced an action against his employer, The New York Central Railroad Co., under the Federal Employers' Liability Act, 45 U. S. C. A. Section 51 et seq. The theory of petitioner's suit was that his employer was negligent in failing to provide him with a safe place in which to work, as a proximate result of which Charles Moreno was the victim of an assault by a fellow employee. The case came to trial some four (4) years later at which time the Cuyahoga County Common Pleas Court directed a verdict for the defendant at the close of plaintiff's case. The verdict of the trial court was affirmed in the Cuyahoga County Court of Appeals without opinion and subsequently, on January 25, 1961, the Ohio Supreme Court overruled Charles Moreno's motion to certify.

Having failed in the Common Pleas Court, the Court of Appeals and the highest Court of Ohio, the Ohio Supreme Court, Charles Moreno now petitions this court for

a Writ of Certiorari under the provision of Title 28 U. S. C. A. 1254 which states:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the United States Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the constitution, treaties or law of the United States, and the decision is in favor of validity.
>
> (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under the United States."

Petitioner says that the rulings of the Common Pleas Court, the Court of Appeals and the Ohio Supreme Court have deprived him of his rights under the Federal Employees' Liability Act, a statute of the United States, and petitions therefore for a Writ of Certiorari.

II. QUESTION PRESENTED FOR REVIEW.

(A) Did the petitioner establish a cause of action against his employer, The New York Central Railroad Co., under the F. E. L. A. on the grounds that said employer was guilty of negligence and violated the F. E. L. A. by failing to have any supervisory employees present at the job sites at any time on Nov. 26, 1954 to check into work of the co-employees or to check on or inspect the co-employee's condition on the day when petitioner was injured by an intoxicated co-employee, who had reported to work in the morning while under the influence of intoxicating liquor, and continued to drink thereafter, thereby breaching its duty to provide plaintiff with a safe place of employment.

III. STATUTES INVOLVED.

Federal Employers' Liability Act, 45 U. S. C. A. Sec. 51 et seq., reads, in pertinent part, as follows:

"LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES.

Every common carrier by Railroad while engaging in commerce between any of the several states or territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none,

then to the next of kin defendant upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered entitled to the benefits of this chapter."

IV. STATEMENT OF THE CASE.

(A) Before Trial.

On November 26, 1954, defendant, New York Central Railroad Company, was in the process of dismantling and abandoning the Linndale yard in Cleveland, Ohio, which had been used as a switching and repair station.

On that date, and for many years prior thereto, plaintiff was employed by the defendant railroad company as a "sheet metal" worker in its bridge and building department. On that same date, a man by the name of Robert Nezbeth was employed by defendant as a "pipefitter" in the same department. Also employed in the bridge and building department was a man named Lenny Long, who, on November 26, 1954, was assigned to plaintiff as a helper and as driver of the truck transporting plaintiff from the Cleveland Union Terminal to the Linndale yards of the defendant railroad company.

Plaintiff would report daily to his foreman, one, Ray F. Kelly, at the company's offices in the Union Terminal,

in downtown, Cleveland, Ohio, and there receive instructions relative to the work for the day.

On the particular day in question, November 26, 1956, plaintiff reported as usual, and was instructed to take a truck, and with Lenny Long, his helper, as driver, go to the Linndale Yard several miles from downtown Cleveland to dismantle some lockers and other office equipment and deliver them to the Union Terminal. He was directed to make two round trips—one in the morning and one in the afternoon.

Upon his arrival at the Linndale Yard he discovered that Robert Nezbeth had been drinking, that his face showed the result of "*plenty* of alcohol." Plaintiff was not particularly concerned about Nezbeth's condition inasmuch as the two men were not working together although working in the same department. The record, of the Proceedings in the Cuyahoga County Common Pleas Court shows that at or about 10:00 A. M. on 11/26/54, Nezbeth in the condition described, came to the place where plaintiff and his helper were working and suggested that the three men leave the yard to get some "coffee." Plaintiff declined, but Long, plaintiff's helper, agreed to go. Both Nezbeth and Long took the truck which had brought plaintiff and his helper from the Union Terminal to the Linndale yard. Nezbeth and Long returned at about 1:00 P. M., with Nezbeth admittedly intoxicated.

The record also shows that Mr. Nezbeth is a man of satisfactory disposition when he is sober; but when "under the influence of liquor he is the most mean and most brutal man you could face." This was also Nezbeth's reputation among the men with whom he worked.

Upon his return to the Linndale Yard, Nezbeth was nasty and quarrelsome and began to direct foul language toward the plaintiff without provocation. Just at that

time a whistle blew three times from the roundhouse, indicating a telephone message from the foreman for someone. Nezbeth, being the "gang leader," should have answered the call, but when he failed to do so, plaintiff went to the roundhouse instead. Upon his arrival at the roundhouse, the clerk on duty there gave him a message for Nezbeth pertaining to some work that Nezbeth was to perform.

Plaintiff returned to the yard and handed the message to Nezbeth, whereup Nezbeth continued using the same foul language as when plaintiff had left him. Plaintiff began walking away from Nezbeth toward the truck which had been used to transport him from the Union Terminal to the Linndale Yard. Nezbeth followed him and suddenly without provocation struck plaintiff in the face, leaving him with a fractured jaw.

Plaintiff's evidence further showed that no supervisory personnel had been present at the Linndale Yard at any time during that morning; nor had anyone checked Nezbeth in to work that morning; that Nezbeth had a reputation for often reporting to work in an intoxicated state; and that he was mean and brutal when in such condition. The evidence further showed that Nezbeth reported to work on 11/26/54 under the influence of liquor, and continued to drink that morning.

The evidence further showed that defendant, New York Central Railroad Company, provided no supervisory personnel at the Linndale yard where Nezbeth reported for work that day, to check on the employees at any time before, at, or after reporting to work, or while on the job that morning.

The petitioner commenced suit against the New York Central Railroad in the Common Pleas Court of Cuyahoga

County on November 6, 1955. Mr. Moreno's petition charged the New York Central Railroad with the following acts of negligence (page 2, Para. 3):

> "Plaintiff states that defendant was negligent in not providing plaintiff with a reasonably safe place to work; that from the time of beginning of work to the time of the attack of plaintiff did any person of a supervisory capacity check on the group of employees with whom plaintiff was working; that had plaintiff's foreman or other supervisory person made such a check, Nezbeth's intoxication would have been discovered and Nezbeth would have been relieved of further work that day and injury to plaintiff thereby prevented."

On the 19th day of November, 1959, the case, captioned Charles Moreno vs. New York Central Railroad and being civil case No. 689,991, came to trial in the Common Pleas Court of Cuyahoga County, Ohio, before the Honorable Charles W. White, Judge thereof.

(B) Verdict in Trial Court.

At the close of plaintiff's evidence, the defendant made the following motion for directed verdict (Record pages 201, and 202):

> "Mr. Ryan: Your Honor, the defendant will now move for judgment at the end of plaintiff's case, on the basis that the plaintiff has not shown that Mr. Nezbeth, the actor in plaintiff's complaint, was acting within the scope of his employment, and at the same time in furtherance of the business for which he was employed.
>
> (Record p. 202) We wish to cite specifically the case of Young vs. The New York Central Railway Company, 88 Ohio Appellate 352, certiorari denied 339 U. S. 986.

This was a case decided by our Court of Appeals. Something I omitted, Mr. Dolan informs me that the plaintiff failed to show a cause of action under the Federal Employers' Liability Act.

The Court: Just a moment. Are you moving for judgment at the close of plaintiff's case, or not? Or are you demurring to the petition?

Mr. Ryan: We are moving for a judgment, your Honor.

The Court: All right."

The trial court directed a verdict in favor of the defendant and granted judgment to the defendant on the authority of *Young vs. New York Central*, 88 O. App. 352 (R. pp. 257-260).

Plaintiff duly excepted thereto and duly filed a motion for a new trial on the following grounds:

1. Error of the Court in granting defendant's motion for judgment at the close of plaintiff's case.

2. Error of the court in admitting or rejecting evidence over objections of counsel to plaintiff's prejudice.

3. Other errors of law appearing in the record.

The motion was overruled and plaintiff appealed to the Cuyahoga County Court of Appeals.

(C) Verdict in the Court of Appeals.

Plaintiff's assignments of error to the Court of Appeals included the following:

(A) Error in granting defendant's motion for judgment at the close of plaintiff's case.

(B) Error in failing to grant plaintiff's motion for a new trial.

The Court of Appeals of Cuyahoga County, Ohio affirmed the judgment of the trial court without opinion.

the journal entry reading as follows (Exhibit A—Appendix p. 21):

> "This cause came on to be heard on the appeal on questions of law from the judgment of the Common Pleas Court of Cuyahoga County and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant and therefore the judgment of the Court of Common Pleas is affirmed and it is ordered that the appellee recover of appellant his costs herein taxed.
>
> The Court finds there was reasonable grounds for this appeal.
>
> It is ordered that a special mandate issue out of this court directing the Court of Common Pleas to carry this judgment into execution. Plaintiff excepts."

Plaintiff then appealed to the Supreme Court of Ohio, assigning the following errors:

> (A) Error in granting defendant's motion for judgment at the close of plaintiff's case.
>
> (B) Error in failing to grant plaintiff's motion for a new trial.
>
> (C) Error by the Court of Appeals in affirming the action of the trial court.

(D) Verdict in the Supreme Court of Ohio.

On January 25, 1961, the Ohio Supreme Court overruled Mr. Moreno's motion for an order directing the Court of Appeals of Cuyahoga County to certify its record. The Court without opinion, made the following ruling (Exhibit B—Ruling of Ohio Supreme Court, p. 21, *infra*):

> "It is ordered by the court that this motion be and the same hereby is, overruled."

V. REASONS FOR GRANTING THE WRIT.

The basic issue involved herein is whether or not defendant-employer provided plaintiff-employee with a safe place in which to work. The record shows that defendant failed to have any supervisory personnel present at any time during the day on which plaintiff was attacked. It is plaintiff's contention that defendant thereby failed to provide plaintiff with a safe place in which to work.

The trial court's ruling was based on the authority of *Young vs. New York Central Railroad,* 88 Ohio App. 352, which case held that an employer was not liable for an unprovoked attack by one employee upon another employee, not involving furtherance of the employer's business, and wherein motion to certify was not granted either by the Ohio Supreme Court or by the United States Supreme Court.

In the present case, however, we are not dealing with that simple a problem. Plaintiff's contention is not merely that he was attacked by another employee, but that his employer failed to provide him with a safe place in which to work, and that the employer's negligence in that respect was the cause of his injury; that, by proper supervision or inspection, defendant could have avoided the consequences that gave rise to plaintiff's injury; that the failure to supervise and inspect, after a reasonable time in which to have notice of an employee's intoxicated condition, was negligence for which plaintiff is entitled to recover for injuries sustained. Hence, the issue raised in the *Young* case above, as to whether the injury was sustained while the *attacker* was furthering his employers' business, is immaterial in this case.

In order to crystallize the issue in this case and to point up the fact that the trial court granted defendants motion for a directed verdict based upon the erroneous

supposition that the case of *Young vs. New York Central Railroad Co.*, 88 O. A. 352, certiorari denied 339 U. S. 986, 94 L. Ed. 1388 (1949) controlled this Moreno case, and that the trial court entirely overlooked the distinction between this Moreno case and the *Young* case, the plaintiff-appellant is submitting in toto the ruling of the trial court as set forth on p. 257 of the trial court record, to-wit:

> (257) "The Court: Gentlemen of counsel, in the relatively brief time that was allotted to me for consideration of defendant's motion, which I take in its entirety is a motion to arrest the case and the evidence from the jury and enter judgment for the defendant—is that correct, Mr. Ryan?
>
> Mr. Ryan: Yes, your Honor.
>
> The Court: I have given the subject painstaking consideration. I have read and reread the Young case, from the Court of Appeals of Cuyahoga County, and the Tatham case from Illinois, which was not cited but which is reported in ALR, Second, Volume 33, at page 1287, and it is found in the annotations, in which all of the leading cases are reviewed.
>
> I have also examined a very informative article in 17 Ohio State Law Journal on what is a safe place to work. There, again, a number of cases are analyzed and referred to.
>
> Counsel for the plaintiff in answer to my question yesterday conceded that this Court is bound by the decision of the Court of Appeals of Cuyahoga County, unless the Court should be able to distinguish that case.
>
> The Court has made strenuous efforts to find some basis for distinguishing the Young case from the instant case, (258) and I am rather sad to acknowledge that the Court has failed in that effort.
>
> This plaintiff suffered a grievous injury. The Court has been impressed by this total lack of fear, and his honesty as a witness, and it has been impressed, too, by his intelligence.

The Court believes that Mr. Moreno represents an ideal type of workman, conscientious, does his work, loyal to his employer, faithful to any task that is assigned to him.

Of course, you gentlemen realize that this motion has to be decided on the basis of the law as the Court finds the law to be or understands it to be, and my sympathy for Mr. Moreno cannot be an influence in that connection.

The plaintiff made clear to the Court yesterday in oral argument that he places no reliance upon the theory that the defendant should be held answerable for Mr. Moreno's injury on the principles obtaining under the rule of respondeat superior.

If that were the theory of the plaintiff, it would be appropriate for the Court to consider whether Mr. Nezbeth's acts were within the scope of this employment and in furtherance of the employer's business.

(259) From the statements of counsel for the plaintiff it is crystal clear that this is an action based upon an alleged direct negligence of the employer.

The employer is alleged to have been negligent in not providing a foreman at Linndale Yard on the morning of November 26, 1954, who if present on the scene might have discovered Mr. Nezbeth's condition before he struck Mr. Moreno, and might have relieved him from duty.

There is no evidence that the defendant, through Mr. Kelley or any other agent, had any knowledge that Mr. Nezbeth had been drinking before he came to work, or that he went off the job and indulged in more drinking.

There is no evidence that the defendant through any of its agents had any knowledge that Mr. Nezbeth was accustomed to appear for and be at work under the influence of intoxicating liquor.

The evidence is that among his fellow-workers he had the reputation of sometimes—I think Mr.

Moreno's exact words were "from time to time"—Nezbeth would be on the job under the influence of liquor, and at such times—otherwise a fine, congenial gentleman—he would be a rough, vicious person.

(260) Mr. Moreno did not say that he ever communicated that intelligence, such as he had, and there is no evidence that Mr. Moreno knew of the separate incidents which contributed to that reputation. He just knew that that was the reputation.

The Court is fully aware of the fact that the reviewing courts frown upon directed verdicts in FELA cases; to say the least, they do not encourage them.

But this Court perceives that it is its duty to rule on this motion in accordance with its understanding of the law, without fear what the reviewing courts may ultimately do in this matter, and I hope it goes to the reviewing courts because I would like to see the decision I am about to give tested.

In the opinion of the Court the evidence fails to support the contention of the plaintiff that the New York Central Railroad was negligent in any respect.

On the authority of Young versus New York Central Railroad, 88 Ohio Appellate, page 352, the motion is granted and exception is saved to the plaintiff."

The plaintiff maintains that the defendant-appellee employer was guilty of negligence and violated the Federal Employers' Liability Act (FELA) by failing to have any supervisory employees check in the co-employees or to check on the co-employees condition on the day when plaintiff-appellant was injured by an intoxicated co-employee. The failure to have any supervisory employee on the job site at any time that day constituted a breach of the duty to provide plaintiff with a safe place of employment. Such supervisory employee would have and should have prevented an intoxicated employee from working on

the premises with plaintiff and would have and should have sent said intoxicated employee away from the situs of work. Failure to inspect, or supervise, or have charge of the premises also was negligence and a breach of defendant's duty owed to plaintiff.

Moreno's action was brought under the Federal Employers' Liability Act, and since this Act does not define negligence, the question of whether the defendant provided a safe place in which to work, i.e. whether defendant's failure to act amounted to negligence, must be determined according to the common law. See 56 C. J. S. Master and Servant, § 173.

While a master is not an insurer of his servant's safety, the duty of a master is to exercise *due care* to protect his servant from injury. In 56 C. J. S. Master and Servant § 183, the following statements appear:

> "The degree of care exacted is that of ordinary or reasonable care; generally, no higher degree of care is required, and a master may be liable though not guilty of gross negligence. In the proper performance of his duties as master, he is bound to exercise care and prudence to prevent his employees from being subjected to unreasonable risks or dangers, and he agrees by implication of law not to subject a servant employed by him to extraordinary or unusual perils. He must exercise reasonable care to eliminate those elements of danger to the servant's life and limb which are not the usual and natural incidents of the service when the master has exercised reasonable care, and *he must not expose his employees to perils or hazards against which they may be guarded by proper diligence on his part.* * * *
>
> "Under the Federal Employers' Liability Act an employer's liability is to be determined under the general rule, which defines negligence as the lack of due care under the circumstances, or *the failure to do*

what a reasonable and prudent man ordinarily would have done under the circumstances of the situation, or doing what such a person, under the existing circumstances would not have done; and *a master is liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.*" (Emphasis added.)

The above statements based on numerous cases indicate that as a matter of law the defendant-employer was under a duty to take care of the plaintiff-employee by providing him with a safe place in which to work. Whether defendant fulfilled that duty was a question of fact to be decided by the jury after *all* of the testimony was concluded. The trial court was in error in granting defendant's motion for judgment at the close of the plaintiff's case.

Plaintiff will agree that a master is not compelled to foresee and guard against an accident which a reasonable and prudent man would not expect to happen; however, where the facts are such that the consequences attributable to the negligence of a master are within the field of reasonable anticipation, he is liable for an injury received by a servant in consequence thereof. Thus. it was defendant's duty to supervise and know of the condition of all of its employees, especially at the time they report in to work, and throughout the day, as well, especially where such employees have an opportunity to sneak off and "take a nip."

As long ago as 1854, in the case of *Cleveland, Columbus & Cincinnati Railway vs. Keary,* 3 Ohio St. 201, the Supreme Court of Ohio recognized the principle that it is the duty of an employer to provide reasonably safe conditions in which his employees must do the work assigned

to them, and that an employer is under a duty to superintend and control the forces which he employs.

The defendant-employer New York Central Railroad Co., clearly failed to perform its duty, as indicated in the facts of this Moreno case. However, reasonable men may differ in a determination of this fact and our plaintiff was, to say the least, entitled to such a determination. Where, at the close of plaintiff's case, defendant moves for a directed verdict in his favor because of lack of proof of a material fact, the trial court must overrule the motion and submit the case to the jury if there is any evidence tending to establish the existence of such fact, no matter how much evidence there is to the contrary. *Lloyd v. General Tire & Rubber Co.*, 24 Ohio App. 62, 156 N. E. 531. In this Moreno case there was *no* evidence to the contrary, and all of the evidence, including the testimony of defendant's employees and supervisory employees, was that no one had checked in Nezbeth, or checked on Nezbeth that morning and that he had been drinking and that he struck plaintiff.

The plaintiff-appellant has argued above that the defendant-employer was negligent in not providing plaintiff with a safe place of employment as required by the Federal Employers' Liability Act.

Plaintiff now wishes to cite additional cases in support of his view that the defendant, New York Central Railroad Co., was negligent herein, and submits the following additional authorities:

(a) *Rogers vs. Missouri Pacific Railroad*, 352 U. S. 500, 506 (1957) the Court has properly emphasized to inferior courts that FELA-Jones Act cases differ from ordinary negligence cases, because the Act makes the employer liable for any injury caused "in whole or in part" by its negligence. And "in part" means "even the slightest part." *Rogers v. Missouri Pacific R. R.*, 352 U. S. 500, 506 (1957).

(b) *Lillie vs. Thompson*, 322 U. S. 459 (1947).

Facts: 22 year old female telegraph operator worked alone in a small shanty in an isolated part of railroad yard and was brutally and criminally assaulted.

Court: held carrier had reason to know that yards were frequented by dangerous characters but had failed to take protective measures for plaintiff's safety and reversed a judgment for defendant.

(c) *Tatham vs. Wabash Railroad*, 412 Ill. 568, 33 A. L. R. 2nd 1287 (1952).

Facts: Plaintiff sustained injuries as result of an assault by a fellow employee and charged (2nd ground) employer with direct negligence in knowingly employing a dangerous man to work with plaintiff, thereby creating the hazard which resulted in plaintiff's injuries.

Court: held defendant carrier is under a duty to protect its employees from foreseeable harm from fellow employees.

(d) *Kelly vs. New York, New Haven, and Hartford Railroad*, 138 F. Supp. 82 (1956).

Facts: Plaintiff stabbed by co-employee over a personal matter.

Court: held that evidence was sufficient to show that railroad had prior notice of co-employee's belligerent tendencies and should have discharged co-employee.

There have been also a series of cases under the Federal "Jones" Act pertaining to seamen which have similarly allowed the assaulted employee to sue his employer.

(e) *Wanca vs. Penn Industries, Inc.*, 260 F. 2d 350 (2d Cir. 1958) (Where defendant's foreman had notice that an employee had been quarreling with another of defendant's workmen for half a day, his

failure to fire such employee created a risk that a foreseeable fight would result involving a dangerous instrument, such as a gun, thereby injuring innocent bystanders, such as plaintiff. Judgment for plaintiff *aff'd*).

(f) *Martin vs. C. A. Productions Co.*, 189 N. Y. S. 2d 528 (App. Div. 1959) claimant, a dancer in a musical play, was invited by his employer to attend a closing party held on stage for the cast and others after the final curtain; he was unjustifiably assaulted and injured by a drunken guest invited by the employer whose condition could be found to have been known by the employer; held, aff'ming award of benefits: (1) the fact that claimant received his final wages before the party is not controlling—he was expected to attend the party and to do so was good business; (2) the Bd. was justified in finding that the party, under the employer's aegis on the same stage, was a continuance of the employment.

(g) *Perez vs. Fred Harvey, Inc.*, 54 New Mexico 339, Syll. 5. If a jury should find that when claimant was shot by fellow employee, and the fellow employee was so highly intoxicated that he did not know what he was doing, then his acts would fall in the category of those of an insane person and injuries would be injuries "arising out of employment" within meaning of the Compensation Act.

(h) 99 C. J. S. 765 Workmen's Compensation § 226.

"Intoxicated employee.

An employee is entitled to reasonable care by the employer to protect him from an assault by an intoxicated employee."

Citing 207 N. C. 344, *Wilson v. Boyd and Gaforth.*

(i) *Atlantic Coast Line R.R. vs. Southwell*, 275 U. S. 64 (1927). Assuming that a railroad company

could be held liable under the FELA for the wilful killing of one of its employees by another, if it resulted from the negligent failure of their superior officer to foresee the danger and prevent it, the charge of such negligence in this case is not borne out by the evidence in this case.

(j) *Anderson vs. Security Building Co.*, 100 Conn. 373, 123 A. 843, 40 A. L. R. 1110. The Court said, "whenever an employer puts his employees at work with fellow servants the conditions actually existing, apart from the possibility of wilful assaults by a fellow servant independent of the employment, which result in injury to a fellow employee, are a basis for compensation under the implied contract of that Act. So in this case, although the employer may not have had knowledge actual or constructive, that Markus, a fellow servant of the plaintiff, was insane and liable to run amuck, yet such liability of Markus to run amuck was in fact a condition under which the plaintiff was employed on the night in question, and if such condition of Markus caused an injury to plaintiff as it did, then the injury to the plaintiff arose out of his employment as truly as if it had arisen from the negligence of Markus in doing his work.

VI. CONCLUSION.

Plaintiff contends that the question raised in this appeal is new and novel, and has never been ruled upon by the Ohio Courts or the Federal Courts; that the question is of great public interest and that this plaintiff has been deprived of his right under the Federal Employers' Liability Act.

WHEREFORE, plaintiff-appellant prays that the Court issue a writ of certiorari ordering the Supreme Court of Ohio and/or the inferior courts thereof to certify the rec-

ord to this Supreme Court of the United States of America for further hearing by it and that, upon final hearing, the rulings of the Common Pleas Court of Cuyahoga County, Ohio, and of the Court of Appeals of Cuyahoga County, Ohio, and of the Supreme Court of Ohio be reversed and the case remanded for a new trial.

Respectfully submitted,

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AUSTIN T. KLEIN,
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APPENDIX.

EXHIBIT A. JOURNAL ENTRY OF THE COURT OF APPEALS.

Dated: October 11, 1960.

This cause came on to be heard on the appeal on questions of law from the judgment of the Common Pleas Court of Cuyahoga County and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Court of Common Pleas is affirmed and it is ordered that appellee recover of appellant his costs herein taxed.

The court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Plaintiff excepts.

EXHIBIT B. ORDER OF THE SUPREME COURT OF OHIO.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS OF CUYAHOGA COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion be, and the same hereby is, overruled.